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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. HECTOR HUGO RAMIREZ, Defendant and Appellant.	F058326 (Super. Ct. No. BF126086A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Louis P. Etcheverry, Judge.

Robert Navarro, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lloyd G. Carter and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Hector Hugo Ramirez (appellant) of one count of committing continuous sexual abuse of a child (Pen. Code, § 288.5, subd. (a)). The court sentenced appellant to the middle term of 12 years in state prison.

On appeal, appellant contends that the trial court erred by allowing evidence of prior acts under Evidence Code sections 1101 and 1108, and that it deprived him of due process.[1] In the alternative, he argues that he received ineffective assistance of counsel. He also contends the trial court erred when it instructed with CALCRIM No. 1191. We disagree and affirm.

FACTS

Charged Acts

During a number of months in 2007, appellant inappropriately touched his young daughter (Daughter) approximately once a week. The first time, when Daughter was just under 10 years old, she was falling asleep on the couch when appellant carried her to her parents' bed. It was not unusual for Daughter to sleep in her parents' bed. When Daughter awoke in the morning, appellant was touching her vagina. He also touched her on her back, front, and buttocks. Daughter's mother, Y.O., was not in the room at the time.

On another occasion, Daughter fell asleep, fully clothed, in her bedroom. When she awoke, her pants were off. On still another occasion, when Daughter was in her parents' bed and nearly asleep, appellant grabbed Daughter's hand and forced her to briefly touch his penis. The last time appellant touched Daughter, she was in her parents' bed while her mother made breakfast. Appellant briefly rubbed her breasts and touched her buttocks underneath her clothes with his hands.

In November of 2007, Daughter heard her mother explain to her cousins that it was wrong for men to touch them inappropriately because they could become pregnant. A day later, when Y.O. woke her for school, Daughter told her she had a nightmare and

[1] All further statutory references are to the Evidence Code unless otherwise stated.

said she did not want to become pregnant by her father. Daughter then told Y.O. that appellant had touched her on her breasts, buttocks, and "private part." Y.O. immediately took her children and moved into her brother's house. Her sister-in-law called the police.

Detective Joel Luera interviewed Daughter at school, where she told him that appellant had put his fingers in her vagina. Daughter also told the officer that appellant had touched her approximately once a week for a year, and one time grabbed her hand and forced her to touch his penis. On one occasion, two weeks prior to the interview, appellant touched Daughter on her chest, buttocks, and vagina. At the time, Daughter was lying in her parents' bed with appellant while her mother made breakfast.

Detective Luera interviewed Y.O. She was originally uncooperative and said she did not notice any unusual behavior between Daughter and appellant. She eventually stated that she believed Daughter and she would not go back to appellant. Y.O. responded negatively when asked whether anyone in the family had ever reported allegations of molestation by appellant. At trial, Y.O. claimed she had lied to protect appellant, and she acknowledged knowing about other allegations made against appellant even before Daughter made her allegations.

By the time of Daughter's revelation, Y.O. had been with appellant for 11 years and married to him for five and a half. They separated in 1999 and 2002, but reconciled both times. During these separations, neither Daughter nor anyone else had alleged a molestation by appellant.

Uncharged Acts

Appellant's niece (Niece) was 20 years old at the time of trial. She testified that, in 1998, appellant and Y.O. were living in a separate house on the property where she lived. Appellant and Y.O. watched Niece and her younger sister two evenings a week while their mother went to night school. Sometimes appellant was alone with the children while Y.O. did laundry or took a shower.

At times, while Y.O. was occupied, appellant would make Niece undress and get into bed with him. He touched her, kissed her body, and put his tongue in her mouth. On occasion, he took his clothes off as well.

Sometimes appellant touched Niece on her breasts or buttocks with his hands, or touched her vaginal area with his hand or penis. Other times, appellant made Niece touch and kiss his "private part." The incidents usually lasted, at most, five or 10 minutes. On at least one occasion, appellant ejaculated while rubbing against Niece. He then quickly cleaned her and put her back on the couch with the other children.

Eventually Niece's mother (D.R.) questioned her, and Niece told D.R. what had happened. An investigation followed, during which Y.O. told the detectives that she could not recall any time when she left Niece alone with appellant. At the current trial, Y.O. testified that appellant had had an affair with D.R. before she became involved with him. Appellant told Y.O. that D.R. created the accusations about Niece because he did not want to continue the affair. At the time, Y.O. did not believe that appellant had touched Niece inappropriately.

At the time of trial, Niece had not had contact with Y.O. or Daughter for 10 years. Niece was not aware that her mother had had an affair with appellant.

E. and O., ages 22 and 21, respectively, at the time of trial, were Y.O.'s younger sisters. E. testified that appellant inappropriately touched her while Y.O. and appellant were living in a studio apartment before Daughter was born. On one occasion, when E. was about 11 years old, she spent the night on the couch and awoke to discover appellant rubbing her leg. E. opened her eyes and appellant then stopped and went back to the bed where he and Y.O. slept. Similar incidents occurred on four other occasions, including after Daughter was born.

O. testified that sometime before Daughter was born, when she was about nine years old, she and E. spent the night at appellant and Y.O.'s house. The four of them went to a movie theater together. Y.O. was pregnant and appellant sat between E. and O.

Appellant touched O.'s breasts under her clothing and attempted to place her hand on his penis. O. quietly told appellant not to touch her and went to sit next to Y.O.

On another occasion, when Daughter was a few months old, O. was sleeping on the couch at appellant and Y.O.'s apartment. Y.O. was asleep in the bedroom. O. awoke when she felt appellant trying to take off her blankets. She saw that he was drinking beer and watching pornography. O. asked appellant what he was doing and appellant said he was just drinking a beer. He then went to bed.

On one occasion after E. and O. both refused Y.O.'s invitation to spend the night, E. asked O. if appellant had touched her, too. Both then told each other about the touching. O. was 10 years old at the time.

Years later, in November of 2007, O. told Y.O. about the touching when she spoke to her on the telephone. At that point, O. had not yet heard of Daughter's allegations. Y.O. called E., who confirmed that appellant had touched her as well.

Defense

Appellant testified on his own behalf. He acknowledged that, while his brother was in prison, he had an affair with his brother's wife, D.R. This occurred before he became involved with Y.O. He ended the relationship with D.R. when Y.O. became pregnant and he moved in with her. D.R. was very upset. She continued to "bother" him and said he was "going to be sorry." This behavior continued until a few weeks before Niece made her molestation accusations against him.

According to appellant, when Y.O. babysat Niece, he was at work. He was not charged with a criminal offense regarding Niece.

Appellant denied molesting Daughter. He also denied touching O. and E. inappropriately.

DISCUSSION

1. Admission of Evidence Pursuant to Section 1108

Prior to trial, the People moved to admit evidence of appellant's prior uncharged sexual conduct with Niece, sisters-in-law E. and O., and wife Y.O., pursuant to sections

1101, subdivision (b), and 1108.[2] Appellant objected to admission of Niece's testimony on grounds that it was cumulative and unduly prejudicial under section 352. The trial court eventually ruled that the testimony of Niece, E. and O., but not Y.O., concerning prior uncharged acts was admissible under sections 1101 and 1108. During trial, Niece, E. and O. testified to various acts of molestation by appellant.

Appellant now contends: (1) the trial court abused its discretion in allowing admission of the prior incidents pursuant to section 1101; (2) the evidence was inadmissible pursuant to section 352 under either section 1101 or 1108; (3) admission of the evidence deprived him of due process; and (4) failure of defense counsel to object to admission of the evidence constituted ineffective assistance of counsel. Respondent contends that appellant forfeited the issue as to E. and O., that counsel was not ineffective for failing to object, that the evidence was admissible under both sections 1101 and 1108, and that any error was harmless. In our view, even if the evidence was not admissible under section 1101, the subject evidence was admissible under section 1108 and was not made inadmissible under section 352. We therefore reject appellant's due process and ineffective assistance of counsel claims.

Section 1101, subdivision (a) provides, in general, that "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Section 1101, subdivision (b) allows admission of evidence of an act for a purpose other than to show disposition to commit such an act, e.g., to show motive or intent. An exception to the general rule of exclusion is created in section 1108, subdivision (a), which states, "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's

[2]The motion alleged that appellant's actions with Y.O. constituted molestation because appellant began courting her and had intercourse with her when she was 14 years old.

commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

Our Supreme Court in *People v. Falsetta* (1999) 21 Cal.4th 903 explained that the purpose of section 1108 is to

> """permit[] courts to admit such evidence on a common sense basis—without a precondition of finding a 'non-character' purpose for which it is relevant—and [to permit] rational assessment by juries of evidence so admitted. This includes consideration of other sexual offenses as evidence of the defendant's disposition to commit such crimes, and for its bearing on the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense."' [Citation.]" (*Falsetta*, *supra*, at p. 912.)

Thus,

> "trial courts may no longer deem 'propensity' evidence unduly prejudicial per se, but must engage in a careful weighing process under section 352. Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*People v. Falsetta*, *supra*, 21 Cal.4th at pp. 916-917.)

As *People v. Falsetta* makes clear, the admissibility of evidence under section 1108 is independent of its admissibility under section 1101. (See also *People v. Soto* (1998) 64 Cal.App.4th 966, 984.) Once we "conclude[] that the court did not err in admitting the evidence under section 1108, we need not and do not address the issue of whether that evidence was also admissible under section 1101, subdivision (b) as evidence pertaining to [the defendant's] 'intent.'" (*People v. Callahan* (1999) 74 Cal.App.4th 356, 372.)

Instead, we proceed to analyze whether the subject evidence should have been excluded under section 352. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404; *People v.*

Branch (2001) 91 Cal.App.4th 274, 281.) We examine whether the trial court weighed the probative value against the potential risk of prejudice, confusion, and undue consumption of time. (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1314-1315; *People v. Branch*, *supra*, at pp. 281-286.) We review the trial court's ruling for an abuse of discretion. (*People v. Crabtree*, *supra*, at p. 1314.)

Appellant argues that the allegations of sexual misconduct which occurred in the past had very little probative value and were just that: allegations as opposed to convictions. According to appellant, this prejudiced him as it posed a danger that the jury was likely tempted to punish him for the prior conduct or allow it to bear too strongly on the present charges. We disagree with appellant's interpretation of prejudice.

> "The prejudice which exclusion of evidence under … section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[All] evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in … section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

"'… In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction ….' [Citation.]" (*People v. Branch*, *supra*, 91 Cal.App.4th at p. 286.)

As explained in *People v. Ewoldt*, our Supreme Court deems it important, in evaluating evidence of prior uncharged acts pursuant to section 352, to determine whether "[t]he testimony describing defendant's uncharged acts … was no stronger and no more inflammatory than the testimony concerning the charged offenses." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405.) Such a circumstance decreases the potential for prejudice. (*Ibid.*)

Here, without minimizing the sexual abuse suffered by Niece, E. and O., the offense for which appellant was on trial occurred more frequently and included evidence that appellant digitally penetrated Daughter on more than one occasion. While we recognize that Niece's testimony included evidence of appellant ejaculating while rubbing up against her, the majority of the testimony described by Niece, E. and O. was less inflammatory, as a whole, than the charged offense.

Nor is there an issue here of remoteness. In *People v. Branch*, *supra*, 91 Cal.App.4th at pages 282-283, the remoteness of the 30-year gap was balanced by the similarities in the charged and uncharged offenses. The charged offense involved a 12-year-old step-great-granddaughter and the prior offenses involved a 12-year-old stepdaughter. Both offenses occurred while the girls were staying in the defendant's home, and in both situations the defendant falsely told the victims' caretaker the girls had done something wrong in an attempt to shield himself from being found out. (*Id.* at pp. 284-285.) In *People v. Soto*, *supra*, 64 Cal.App.4th 966, the remoteness was balanced out where the uncharged and charged offenses, occurring 30 and 22 years earlier, respectively, all involved young female relatives alone in the defendant's home. He fondled each of them with his hands and tongue, fondled and digitally penetrated their vaginal areas, and he engaged in the conduct on more than one occasion with each victim. (*Id.* at pp. 969-970, 977-978, 991.)

Here the charged incidents occurred in 2007, and the uncharged acts sometime between 1996 and 1998, approximately nine to 11 years apart. In each instance, appellant chose his victims from among young female family members in his care. The uncharged acts of groping and fondling Niece, E. and O. were strikingly similar to the charged acts. Taken altogether, the evidence of appellant's conduct demonstrated a significant consistency that offsets any argument about remoteness. (*People v. Branch*, *supra*, 91 Cal.App.4th at p. 285, citing *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395.)

It is true, as argued by appellant, that the uncharged acts consumed a substantial amount of trial time (at least one half of the testimonial evidence). But there is no evidence in the record that the jury was confused by the issue or evinced a desire to convict appellant because of the uncharged acts. The one readback requested by the jury was for the testimony of Daughter, indicating the jury was properly focused on determining appellant's guilt or innocence on the charged count.

For all of these reasons, we find no error under section 352.

Although appellant acknowledges the California Supreme Court in *People v. Falsetta*, *supra*, 21 Cal.4th 903 rejected the claim that the admission of evidence of prior sexual acts under section 1108 violates a defendant's constitutional right to due process, he nevertheless wishes to preserve the issue for any future federal proceeding. In *Falsetta*, the court concluded a "trial court's discretion to exclude propensity evidence under section 352 saves section 1108 from defendant's due process challenge." (*People v. Falsetta, supra,* at p. 917.) It therefore held "section 1108 is constitutionally valid." (*Id.* at p. 907.) Following the California Supreme Court's holding in *Falsetta*, we reject appellant's contention that admission of evidence of his prior sexual acts pursuant to section 1108 violated his constitutional due process rights. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Finally, because we have rejected appellant's contentions on the merits, we need not address his claim that counsel was ineffective for failing to object to the section 1108 evidence.

2. CALCRIM No. 1191

In connection with the testimony of Niece, E. and O., the jury was instructed with CALCRIM No. 1191. Appellant contends this instruction violated his constitutional due process rights because it permitted the jury "to use evidence of the uncharged offense as proxy proof of the current charges." We disagree.

The trial court instructed the jury with CALCRIM No. 1191, in relevant part, as follows:

> "If you decide that [appellant] committed the uncharged offenses, you may, but are not required to, conclude from that evidence that [appellant] was disposed or inclined to commit sexual offenses and based on that decision also conclude that [appellant] was likely to commit and did commit [count 1, as charged here]. If you conclude that [appellant] committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that [appellant] is guilty of Count 1. The People must still prove the charge beyond a reasonable doubt."

In *People v. Reliford* (2003) 29 Cal.4th 1007, 1009, 1015-1016 (*Reliford*), our Supreme Court rejected a similar argument asserted by the defendant and upheld the validity of the 1999 version of CALJIC No. 2.50.01 which contained language similar to that contained in CALCRIM No. 1191. Like CALCRIM No. 1191, the 1999 version of CALJIC No. 2.50.01, as given in *Reliford*, stated in relevant part:

> "'If you find that the defendant committed a prior sexual offense in 1991 involving [the victim], you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime of which he is accused. [¶] However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense in 1991 involving [the victim], that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime. The weight and significance of the evidence, if any, are for you to decide.'" (*Reliford, supra*, 29 Cal.4th at p. 1012.)

In *Reliford*, the Supreme Court held,

> "no juror could reasonably interpret the instructions to authorize conviction of a charged offense based solely on proof of an uncharged sexual offense. It is not possible, for example, to find each element of the charged crimes, as the jury was instructed to do before returning a guilty verdict, based solely on the [uncharged] offense. Nor is it possible to find a union or joint operation of act or conduct and the requisite intent for each charged crime, as the jury was also instructed to do. Hence, no reasonable jury could have been misled in this regard. [Citation.]" (*Reliford, supra*, 29 Cal.4th at p. 1015.)

The court further stated,

> "[w]e do not find it reasonably likely a jury could interpret the instructions to authorize conviction of the charged offenses based on a lowered standard

> of proof. Nothing in the instructions authorized the jury to use the preponderance-of-the-evidence standard for anything other than the preliminary determination whether defendant committed a prior sexual offense …. The instructions instead explained that, in all other respects, the People had the burden of proving defendant guilty 'beyond a reasonable doubt.' [Citations.] … The jury thus would have understood that a conviction that relied on inferences to be drawn from defendant's prior offense would have to be proved beyond a reasonable doubt." (*Id.* at p. 1016; see *People v. Lewis* (2009) 46 Cal.4th 1255, 1298 ["as in *Reliford*, we conclude there is no reasonable likelihood that the jury interpreted the instructions as a whole to authorize a conviction based upon proof by a preponderance of the evidence that defendant committed the uncharged offenses"].)

In *People v. Schnabel* (2007) 150 Cal.App.4th 83, the appellate court rejected the defendant's constitutional challenge to CALCRIM No. 1191, based on *Reliford*, *supra*, 29 Cal.4th 1007, stating:

> "As to defendant's challenge to the instruction, it is based on his assertion that the instruction on the use of prior sex offenses 'wholly swallowed the "beyond a reasonable doubt" requirement.' The California Supreme Court has rejected this argument in upholding the constitutionality of the 1999 version of CALJIC No. 2.50.01. [Citation.] The version of CALJIC No. 2.50.01 considered in *Reliford* is similar in all material respects to … CALCRIM No. 1191 (which was given here) in its explanation of the law on permissive inferences and the burden of proof. We are in no position to reconsider the Supreme Court's holding in *Reliford* [citation], and by analogy to *Reliford*, we reject defendant's argument regarding the jury instruction on use of his prior sex offenses." (*People v. Schnabel*, *supra*, 150 Cal.App.4th at p. 87, fn. omitted.)

In *People v. Cromp* (2007) 153 Cal.App.4th 476, 480 (*Cromp*), the appellate court upheld the validity of CALCRIM No. 1191, stating:

> "Although the instruction considered in *Reliford* was the older CALJIC No. 2.50.01, there is no material difference in the manner in which each of the instructions allows the jury to conclude from the prior conduct evidence that the defendant was disposed to commit sexual offenses and, therefore, likely committed the current offenses. CALCRIM No. 1191, as given here, cautions the jury that it is not required to draw these conclusions and, in any event, such a conclusion is insufficient, alone, to support a conviction. Based on *Reliford*, we therefore reject defendant's contention that the instruction violated his due process rights."

Appellant acknowledges the holdings in *Reliford* and *Cromp*, but raises the issue to preserve it for later review. He essentially argues that the holding in *Reliford* is incorrect, based on Justice Kennard's concurring and dissenting opinion that finds the language of the instruction ambiguous and confusing and potentially allows a conviction based on the finding that the uncharged crime occurred. (See *Reliford, supra*, 29 Cal.4th at pp. 1017-1018 (conc. & dis. opn. of Kennard, J.).)

We find the majority holding in *Reliford*, which we are bound to follow under *Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d 450, disposes of appellant's renewed argument against the reading of CALJIC No. 1191 with regard to other crimes evidence. We decline to revisit the issue. Appellant's reliance on *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, 820-825, overruled in part on another ground in *Byrd v. Lewis* (9th Cir. 2009) 566 F.3d 855, 866, is misplaced as that case merely addressed the 1996 version of CALJIC No. 2.50.01, which was subsequently revised to clarify how jurors were required to evaluate the defendant's guilt relating to the charged offense if they found the defendant had committed an earlier sex offense. (*Reliford, supra*, 29 Cal.4th at pp. 1012-1013.) We therefore conclude the trial court properly instructed with CALCRIM No. 1191, and we reject appellant's argument to the contrary.

DISPOSITION

The judgment is affirmed.

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DAWSON, J.

WE CONCUR:

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CORNELL, Acting P.J.

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HILL, J.